

2010 WL 3010318 (Cal.Superior) (Trial Motion, Memorandum and Affidavit)  
Superior Court of California.  
Sonoma County

Clay M. GREENE, Jannette Biggerstaff, Executor of the Estate of Harold Scull, Deceased, Plaintiffs,

v.

THE COUNTY OF SONOMA; Jo Weber; Sally Liedholm; Karen Stagg-Hourigan; Michael  
Brewster; North Bay Auctions, LLC, a California Limited Liability Company, Agua Caliente Villa,  
an unknown business entity, Kim Dillingham; And Does 1 through 50, inclusive, Defendant.

No. SPR-81815.  
June 15, 2010.

**Memorandum of Points and Authorities in Support of Demurrer to Second Amended Complaint  
on Behalf of County of Sonoma, Sally Liedholm, Karen Stagg-Hourigan, and Michael Brewster**

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Hourigan](#).

Hon. [Robert Boyd](#).

**Assigned to Hon. Robert Boyd for All Purposes**

**Unlimited Civil Matter**

**[C.C.P. §430.10 (a),(c),(e)(f)]**

**Date: 8-25-10**

**Time: 3:00**

**Dept.: 17**

TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. ALLEGATIONS OF THE SECOND AMENDED COMPLAINT .....	1
III. LEGAL ARGUMENT .....	3
A. Bases for General and Special Demurrer .....	3
IV. THE GENERAL DEMURRER .....	4
1. The Complaint Is Uncertain And Ambiguous .....	4
2. Defendants County And Its Employees, Liedholm, Stagg-Hourigan And Brewster, Are Immune From Liability .....	5
3. The County Employees Are Entitled To Discretionary Immunity: .....	5
4. The County Is Immune From Liability For The Discretionary Acts Of Its Employees .....	7
5. The County Is Not Liable For The Alleged Misrepresentations Of Its Employees .....	7
6. Plaintiffs Have Failed To Allege Facts Sufficient To Constitute a Cause of Action for <b>Elder Abuse</b> .....	9
7. The Complaint Fails to State a Cause of Action Pursuant to <a href="#">Probate Code Sections 850, 855, and 859</a> ....	12
8. The Complaint Fails To Plead Federal And State Constitutional Law Claims .....	13

V. THE SPECIAL DEMURRER - THE FOURTEENTH CAUSE OF ACTION FOR ACCOUNTING AND FIFTEENTH CAUSE OF ACTION FOR CONVERSION ARE THE SUBJECT OF ONGOING LITIGATION .....	16
VI. CONCLUSION .....	16

## TABLE OF AUTHORITIES

## Cases

<i>Alicia T. v. County of Los Angeles</i> (1990, 2nd Dist) 222 Cal App 3d 869.....	6
<i>Ankeny v. Lockheed Missiles and Space Co.</i> (1979) 88 Cal.App.3d 531.....	4
<i>Block v Sacramento Clinical Labs, Inc.</i> (1982) 131 Cal.app.3d 386.....	6
<i>Bookout v. Nielsen</i> (2007) 155 Cal.App.4th 1131.....	11
<i>Burden v. Co. of Santa Clara</i> (2000) 81 Cal.App.4th 244.....	7, 8
<i>Caldwell v. Montoya</i> (1995) 10 Cal.4th 972.....	5
<i>County of Los Angeles v. Superior Court</i> (2002) 102 Cal.App.4th 627.....	5, 6
<i>Covenant Care, Inc. v. Superior Court</i> (2004) 32 Cal.4th 771.....	9, 10
<i>Daley v. Regional Transportation District</i> (1992) 142 F.R.D. 481 at 485.....	3
<i>Delaney v. Baker</i> (1999) 20 Cal.4th 23.....	10, 11
<i>Elden v. Sheldon</i> (1988) 46 Cal.3d 267.....	13
<i>Foy v Greenblott</i> (1983) 141, Cal.App.3d 1 .....	6
<i>Golden Gate Water Ski Club v. County of Contra Costa</i> (2008) 165 Cal.App.4th 249.....	13
<i>Harshbarger v. City of Colton</i> (1988) 197 Cal.App.3d 1335.....	8
<i>Intrieri v. Superior Court</i> (2004) 117 Cal.App.4th 72.....	10
<i>Johnson v. State of California</i> (1968) 69 Cal.2d 782.....	6, 7
<i>Lopez v. Southern Cal. Rapid Transit Dist.</i> (1985) 40 Cal.3d 780.	10
<i>Mack v. Soung</i> (2000) 80 Cal.App.4th 966.....	11
<i>Marvin v Marvin</i> (1976) 18 Cal.3d 660.....	13
<i>Masters v. San Bernardino County Employees Retirement Assn.</i> (1995) 32 Cal.App.4th 30.....	7
<i>McColm v. San Francisco Housing Authority</i> (2009 WL 2901596, 13 (N.D.Cal.) .....	15
<i>McMahon v. Craig</i> (2009) 176 Cal.app.4th 1506 .....	13, 14
<i>Sababin v. Superior Court</i> (2006) 144 Cal.App.4th 81.....	10
<i>Saltares v. Kristovich</i> (1970, 2nd Dist) 6 Cal App 3d 504.....	6
<i>Searcy v. Hemet Unified School Dist.</i> (1986) 177 CA3d 792.....	3
<i>Taorimina v. California Dep't of Corrections</i> (S.D.Cal.) 946 F.Supp. 829.....	15
<i>Teidemann v. Superior Court</i> (1978) 83 cal.App.3d 918 .....	6
<i>Williams v. Beechnut Nutrition Corp.</i> (1986) 185 Cal.App.3d 135	4

## Statutes

42 U.S.C §1983 .....	13, 14
California Code of Civil Procedures §430 .....	3, 5, 14, 16, 16
California Rules of Court §2.112 .....	3
California Civil Code §47 .....	6, 7
California Civil Code §51 & 52 .....	14, 15
California Government Code §810 .....	5, 6
California Government Code §811.4 .....	5
California Government Code §815.2(b) .....	7
California Government Code §818 .....	7, 9
California Government Code §820 .....	5, 7, 12, 15
California Probate Code §850 .....	12
California Probate Code §855 .....	12
California Probate Code §856 .....	12, 13

California Probate Code §859 .....	12
California Welfare & Institutions Code §15610 .....	9
<b>Other Authorities</b>	
California Civil Practice §9:4 (2004) .....	4
5 Witkin, <i>California Procedure 4th</i> , Pleading § 928 (1997) .....	4
California Civil Practice Torts §29:14 .....	5, 6

## I. INTRODUCTION

Despite numerous attempts to work with Plaintiffs' counsel on the deficiencies in the Complaint, the current pleading, the Second Amended Complaint, is still defective in many respects. This is the second demurrer these defendants have had to file in this action as a result.

Defendants deny the vast majority of the charging allegations of the Complaint, but on demurrer, must assume their truth, and the following is a summary of the claims now encompassed in the Second Amended Complaint.

The Second Amended Complaint ("SAC") purports to allege eighteen causes of action on behalf of Clay Greene ("Greene") and Jannette Biggerstaff, as Executor of the Estate of Harold Scull ("Biggerstaff") (collectively "plaintiffs"). Seventeen causes of action, are specifically alleged against the County of Sonoma ("County") and/or one or more of its employees, Jo Weber ("Weber"), Sally Liedholm ("Liedholm"), Karin Stagg-Hourigan ("Stagg-Hourigan") and Michael Brewster ("Brewster"). [Jo Weber has been dismissed from the action as of this writing and the SAC's deficiencies as to her will not be addressed in this Demurrer.]

## II. ALLEGATIONS OF THE SECOND AMENDED COMPLAINT.

The SAC contains 177 separate paragraphs, which are in many ways duplicative of earlier allegations, which duplication itself causes the pleading to be particularly difficult to follow and uncertain and ambiguous in many respects. Each of the 17 causes of action alleged against these defendants is based on the allegations contained in the first 53 paragraphs of the SAC, entitled "GENERAL ALLEGATIONS". In essence, those first 53 paragraphs of the SAC allege:

that Scull and Greene were a gay couple living in a long-time committed relationship (par.6); that the Office of the Public Guardian/Public Conservator (referred to in the SAC as OPC) was appointed Conservator of Scull through the efforts of Liedholm and Stagg-Hourigan (par. 8); that Liedholm, Stagg-Hourigan, and Brewster were County employees working for the OPC. (pars. 11, 12, and 13);

that County employees took possession of Greene's and Scull's personal property, financial accounts and cash on hand, and Greene's and Scull's Social Security payments, dividends and interest, as well as all of Greene's and Scull's sources of income, and converted these to their own purposes, all of which is alleged to have been done wrongfully and without authority (par. 21); this control over Scull and Greene was allegedly obtained by virtue of the County employees having made false and misleading representations and statements in support of a Petition for Temporary Conservatorship of Scull's Estate, and later a Petition for Appointment of a Probate Conservator, and by wrongfully inducing Scull to sign the papers for same, while at the same time asserting control over Green's property as well; two of these County employees (Liedholm, Stagg-Hourigan) are alleged to have withheld material, relevant information from the Court in order to facilitate that control of plaintiffs' property, finances and assets (pars. 23, 24);

that County employees exceeded the authority they wrongfully obtained through the earlier alleged misrepresentations in the handling of Scull's and Greene's finances and property (par. 25);

that County employees misrepresented facts to the Court, and later to others, without basis for their belief in those facts, as to Greene's state of dementia in order to obtain control over where Greene was to live, and to place him in a living facility without authority based on those representations (pars. 26, 27);

that County employees kept Greene away from his long time partner through false representations to Plaintiffs and others as to Greene's ability to care for himself; by additional false representations and promises, they coerced and induced Plaintiff Greene to live at the Agua Caliente Villa facility (ACV, which is also a defendant) (par. 28);

that various defendants disparaged Greene while at ACV because of his status as a gay man (par.29);

that the County and its employees wrongfully induced Greene and Scull to appoint the OPC as their Representative Payee for collecting and disbursing their Social Security benefits through false representations as to Greene's inability to manage his finances (pars. 31, 32);

that County employees falsely represented their authority over Greene in failing to allow him contact with Scull and others (par. 33);

that an unknown County employee took away two cats belonging to Green, and that the named County employees have retained possession of them (par. 34);

that defendants acted wrongfully in obtaining possession of Greene's and Decedent's property in order to convert it to their own use (pars. 35 - 39);

that the County "authorized and ratified" the acts of its employees (par. 42), that its actions constitute "state action" (45); that "Defendants" were guilty of recklessness and oppression and fraud and malice (46); that "Defendants" are guilty of bad faith pursuant to [Probate code section 859](#), and subject to double damages (47); that County and its employees were subject to various statutory "mandatory duties" (par. 51), and that "Defendants" are subject to punitive damages (par.52).

Other allegations are added in the separate "causes of action", and will be addressed below in the body of this demurrer; but all of them are based on and incorporate the above allegations.

### **III. LEGAL ARGUMENT**

#### ***A. Bases for General and Special Demurrer.***

Objections to a pleading by demurrer are appropriate when grounds for them appear from the allegations. [Code of Civil Procedure section 430.30\(a\)](#). A complaint is subject to demurrer if it is ambiguous and uncertain as to which party is suing which defendant for the particular conduct alleged. [Code of Civil Procedure section 430.10\(f\)](#); [Calif. Rule of Court 2.112](#). A demurrer is also proper when the complaint fails to allege an essential element of a cause of action ([CCP section 430.10\(e\)](#)), or when there is another action pending between the parties on the same cause of action. [CCP section 430.10\(c\)](#).

Absent a statute imposing liability, defendant County, as a public entity, is immune from liability. [Government Code §815](#). Every fact essential to the existence of statutory liability against a public entity must be pleaded with particularity, including the existence of a statutory duty. [Searcy v. Hemet Unified School Dist.](#) (1986) 177 CA3d 792, 802. And due to the deference afforded governmental officials, the pleadings must form the basis for the action and the avoidance of immunities. A demurrer is appropriate to address governmental immunities. See, [Daley v. Regional Transportation District](#) (1992) 142 F.R.D. 481 at 485.

### **IV. THE GENERAL DEMURRER**

### **1. *The Complaint Is Uncertain And Ambiguous.***

In pleading allegations in a Complaint, the essential facts of the case should be stated “with clearness and precision; allegations of fact that are left to surmise are subject to demurrer. *Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 537. A demurrer based on uncertainty goes to a doubt as to what the plaintiff means by the facts alleged. 5 Witkin, *California Procedure* 4th, Pleading § 928 (1997) Such a demurrer will be sustained when a defendant cannot reasonably determine what he is required to respond to, as when a plaintiff joins multiple causes of action as one, or fails to properly identify each cause of action. Justice Eileen C. Moore, Michael Paul Thomas, Esq., *California Civil Practice* §9:4 (2004); *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135,139, fn.2.

In the present case, while Plaintiffs have added names of specific parties in some of the paragraphs, it is still at times difficult to determine the precise basis of the claim made in each cause of action, i.e., “who is being sued for what.” In only general terms, both plaintiffs raise certain claims against multiple defendants without specifying which plaintiff makes the claim, or which defendant is charged with which act or omission. They also claim damages, including penalties and punitive damages, cumulatively against “Defendants”, without identifying which defendant's conduct gives rise to such claims. These defects existed in the original Complaint, and while attempts have been made to identify some of the conduct of each Defendant, the problem still exists within nearly all of the causes of action.

For example, in what is titled the Second Cause of Action, **Elder Abuse**, the title purports to be alleging this claim against all remaining defendants, but it is unclear as to which defendant certain conduct is alleged. Paragraph 77 alleges that “Defendants” neglected and failed to provide care for Plaintiffs; and paragraphs 78, 79, 80, 83 a) all refer merely to “COUNTY OF SONOMA” with respect to alleged conduct relating to Greene's residency and property. “Defendants” are alleged to have caused damage and acted maliciously. Pars. 84 -87. Combining all defendants in allegations containing essential elements of the claim is improper, and results in insufficiently particularized allegations, rendering this second cause of action uncertain and ambiguous as to which individual's conduct is in question.

The same is true for all remaining causes of action alleged against the County and its employees; the charging allegations throughout refer merely to “Defendants” or “County”; and in the 7th Cause of Action it is not even clear on behalf of which Plaintiff the claim is alleged. See par. 115.

In light of SAC's perplexing allegations, these defendants cannot reasonably determine how to respond to any cause of action. Some of the claims are not fixable in other respects, as discussed below, but to the extent claims are capable of being amended, the Court should sustain the general demurrer and give plaintiffs an opportunity to plead the allegations of the Complaint with sufficient certainty as to each plaintiff, each defendant, and each claim against them, including the claims for damages, so that these Defendants may properly respond. CCP §430.10(f).

### **2. *Defendants County And Its Employees, Liedholm, Stagg-Hourigan And Brewster, Are Immune From Liability.***

The allegations contained in the SAC all are premised on conduct by the County, a public entity, and its employees. [Government Code section 820.2](#) provides immunity for the *discretionary acts* of a *governmental official* performed within the course and scope of his or her authority, “whether or not such discretion be **abused**.” *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 979-980 (emphasis added). The term “government official” includes both officers of a public entity and its employees. [Government Code §811.4](#). The rule providing that a public employee is not liable for an injury resulting from discretionary acts or omissions takes precedence over the provisions of [Government Code §820\(a\)](#). See, [California Civil Practice, Torts §29:14](#).

### **3. *The County Employees Are Entitled To Discretionary Immunity:***

Discretionary acts within this immunity typically involve complex tasks requiring the consideration and balancing of many factors to achieve statutory objectives, and include making subjective determinations that are fraught with possibilities of an erroneous decision. [California Civil Practice Torts §29:14](#); citing *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627.

The SAC alleges in each cause of action, by incorporating previous allegations, that the County and its employees obtained authority over Plaintiffs first through a Petition for Temporary Conservatorship of Scull's Estate, and later through a Petition for Appointment of a Probate Conservator. The SAC also claims in each cause of action that authority was wrongfully obtained over Scull and Greene by having Greene and Scull agree to appoint the OPC as their Representative Payee for collecting and disbursing their Social Security benefits. These allegations are premised on statements made by County employees in a judicial proceeding, which are absolutely privileged. [Civil Code section 47](#); *Teidemann v. Superior Court* (1978) 83 cal.App.3d 918, 924. The privilege applies to statements made preparatory to or during investigations by those authorized to do so (*Tiedemann, Id.*), and has been applied to statements made by social workers. *Block v Sacramento Clinical Labs, Inc.* (1982) 131 Cal.app.3d 386, 390.

There are also allegations that County employees wrongfully placed Scull and Greene in various living facilities with consequential damage as a result. And to the extent they appear briefly in the SAC, there are also allegations that County employees failed to obtain promptly a Conservatorship over Plaintiffs' persons. All of these are discretionary decisions which require a balancing of the advantages and disadvantages of each.

Discretionary immunity has been applied to bar suit based on: the decision whether and where to place a child into a foster home (*Johnson v. State of California* (1968) 69 Cal.2d 782, 796); a public guardian's choice to place a conservatee into a particular care facility (*Foy v Greenblott* (1983)141, Cal.App.3d 1, 5); an estate administrator's decision not to make payments on encumbrances, resulting in foreclosure of trust deeds (*Saltares v. Kristovich* (1970) 6 Cal App 3d 504); a social worker's investigation of child **abuse** (*Alicia T. v. County of Los Angeles* (1990) 222 Cal App 3d 869); and a foster care worker's placement of a ward in a foster family home in which he was sexually molested. *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627.

Here the County employees Stagg-Hourigan, Liedholm and Brewster are alleged to be “government officials” and employees of the Human Services Department for the County of Sonoma. Their decisions whether or not to petition on behalf of Plaintiffs for certain types of protection from the Court, and whether or not to assist Plaintiffs as Representative Payees for purposes of handling their Social Security benefits, and whether or not to place Plaintiffs in any given facility, necessarily required the exercise of their discretion, and they are immune from liability under [Government Code §820.2](#) for any claims arising from those decisions, and pursuant to [Civil Code section 47](#) for statements made in any judicial proceeding.

#### ***4. The County Is Immune From Liability For The Discretionary Acts Of Its Employees.***

A public entity is not liable for injuries except as otherwise provided by statute. [Government Code §815\(a\)](#). Under [Government Code §815.2\(b\)](#), a public entity is not liable for the torts of its employees “where the employee is immune from liability.” Because employees Stagg-Hourigan, Liedholm and Brewster are public employees who are entitled to discretionary immunity, it follows that the County of Sonoma is likewise immune.

#### ***5. The County Is Not Liable For The Alleged Misrepresentations Of Its Employees.***

The County is immune from all claims arising from alleged misrepresentations, concealments, or other fraud-related claims, based on statements, acts, or omissions of its employees. [Govt. Code section 818.8](#). This applies to both negligent and intentional misrepresentations, and the County is wholly immune from claims arising therefrom. See the discussion in CEB, California Government Tort Liability Practice, sections 10:38, 10:39.

Although the statute's language does not limit its applicability, this immunity has been interpreted to apply to claims in which it is alleged that the misrepresentations interfered with a financial or commercial interest. There must either be a commercial transaction between the entity and the plaintiff, or a claim that the government interfered with a commercial or financial interest of the plaintiff. *Johnson v. State of California* (1968) 69 Cal.2d 782. See, also, the cases of: *Burden v. Co. of Santa Clara* (2000) 81 Cal.App.4th 244 [immunity barred an attorney's claim that the County caused his relocation to the Bay Area and his eventual return to his former law practice under less favorable financial conditions because of its fraudulent inducement in hiring him for a permanent position]; *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30 [County was immune from plaintiff's allegations that public employees had told her that her application would be ruled upon fairly and within three to five months, and that in reliance on these representations, she did not secure disability income insurance]; *Harshbarger v. City of Colton* (1988) 197 Cal.App.3d 1335, 1342 [City was immune from homeowners' claim that they had to reconstruct their home to bring it up to city code standards after city building inspectors, who had periodically inspected the home, had intentionally misrepresented and suppressed the fact that the home did not meet code standards].

Here the SAC repeatedly and throughout each and every cause of action alleges that through misrepresentations, fraud, concealment of facts, and the inducing of Plaintiffs to act against their own interests, the County employees obtained authority over, agreements from, and control over Greene and Scull, and obtained control over and possession of their complete finances, sources of income and living arrangements. It alleges taking Greene out of his home and putting him in a place against his will, and the taking possession of virtually all of Plaintiffs' finances, bank accounts, property, and sources of income, as well as the wrongful disposal/conversion of assets belonging to both plaintiffs. (See paragraphs 21 through 28 as outlined above.) It alleges that the County and its employees wrongfully induced Greene and Scull to appoint the OPC as their Representative Payee for collecting and disbursing their Social Security benefits through false representations as to Greene's inability to manage his finances (pars. 31, 32), and that County employees falsely represented their authority over Greene in failing to allow him to have contact with Scull and others (par. 33). The allegations are at least as much of an interference with Plaintiffs' financial interests as those which were in issue in the *Harshbarger* case, and are as much or more so as those discussed in the *Burden* case.

The immunity provided in [section 818.8](#) applies to all causes of action to the extent they are considered tort claims. In this case, that includes virtually every cause of action asserted against the County. For example, the First Cause of Action, **Elder Abuse**, is based on the claim that the Public Guardian was appointed both the Temporary Conservator and Conservator of Scull's estate, and the alleged subsequent **abuse** of that power, (par. 55) Obtaining this status is alleged to have been possible because of misrepresentations by County employees. (See pars. 23 and 24.) It also alleges a breach of the duties imposed on the County after being named the Representative Payee for Scull's Social Security payments (par. 56), another role which allegedly was obtained by false representations and inducements. (See pars. 31 and 32). The same is alleged as to Greene, i.e., the wrongful possession and disposal of his property and the **abuse** of the confidential relationship imposed by virtue of initiating a Petition for Conservatorship (par. 57) and the County's status as Representative Payee for Greene (par. 58), both of which are also based on alleged misrepresentations of County employees. (See pars. 26-28; par. 31.)

The Second Cause of Action, Breach of Fiduciary Duty, is also based on the same allegations, and on the County's alleged status as a fiduciary. That role was only obtained, according to the Complaint, by misrepresentations made by County employees, as noted above. And the same is true for the Sixth, Seventh and Eighth Causes of Action, the Civil Rights and Due Process claims, as they too are based on the "color of state law", which authority was allegedly obtained by employee misrepresentations.

Frankly, virtually all of the claims against the County are based on these same alleged misrepresentations by County employees of the Plaintiffs' conditions and abilities, and the allegations that by virtue of those representations, concealments, and wrongful inducements, the County employees gained the ability to and allegedly did interfere with Plaintiffs' finances and assets, and obtained power over Plaintiffs as a result. [Gov. Code section 818.8](#)'s immunity therefore applies to bar all claims plead against the County, the First through Eleventh causes of action, and the Thirteenth through Eighteenth causes of action.

## 6. Plaintiffs Have Failed To Allege Facts Sufficient To Constitute a Cause of Action for **Elder Abuse**.

“**Abuse** of an **elder** or a dependent adult” means either of the following:

- (a) Physical **abuse**, neglect, financial **abuse**, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
- (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.”  
[Welf. & Inst.Code § 15610.07](#).

Allegations in support of an **Elder Abuse** Act claim must be factually specific; bare assertions in a complaint are insufficient, and a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages. [Covenant Care, Inc. v. Superior Court](#) (2004) 32 Cal.4th 771; [Lopez v. Southern Cal. Rapid Transit Dist.](#) (1985) 40 Cal.3d 780, 795. While there are many facts pled in the SAC, none of them rise to the level of physical **elder abuse** as contemplated by the statutes and case law interpreting them.

The **Elder Abuse** statutory scheme was meant to address misconduct considered to be heinous in nature. “The purpose of the [Act was] essentially to protect a particularly vulnerable portion of the population from *gross mistreatment in the form of abuse and custodial neglect*.” [Delaney v. Baker](#) (1999) 20 Cal.4th 23, 33. The heightened civil remedies included in the Act are based on *egregious elder abuse* and *egregious acts of misconduct*. *Ibid*.

A review of some of the case law analyzing the facts needed to support a claim for **Elder Abuse** aptly demonstrates how egregious the conduct needs to be. In [Intrieri v. Superior Court](#) (2004) 117 Cal.App.4th 72, a patient in the Alzheimer wing of a residential facility was assaulted by another patient. The Court found a triable issue of fact existed as to whether the facility was reckless in its neglect of the injured patient because of a long list of problems. It had written the access code above the door keypad so that non-Alzheimer patients could get in to the wing; it had allowed the attacker into the wing, even though employees were well aware of his confused and angry mental state; he was in the Alzheimer's unit and yelling at another patient without intervention by anyone long enough for Mrs. Intrieri, and others, to leave their own rooms to see what the ruckus was about, which was when Mrs. Intrieri was injured. The court took all of this into account, the prior knowledge of this man's mental state, the accessibility to the Alzheimer wing, and the failure to supervise or intervene, and found that it raised an inference of recklessness sufficient to defeat a motion for summary judgment.

In [Sababin v. Superior Court](#) (2006) 144 Cal.App.4th 81, the Court of Appeal again held that a triable issue existed as to whether there was sufficiently reckless conduct under the **Elder Abuse** Act. In that case, the facility had failed to carry out the specific care plan created for the very skin disease the patient was being treated for, which failure showed a deliberate disregard of the high degree of probability that she would suffer injury.

And the *Delaney* case itself discusses another serious fact pattern of egregious conduct, upholding the lower court's finding of **elder abuse** after a trial. Less than four months after being admitted to the nursing facility, the patient died with stage III and stage IV **bedsores** on her ankles, feet, and buttocks. Some of these were so bad that her tissue had been eaten away down to the bone. She was frequently left lying in her own urine and feces for extended periods of time. There were numerous violations of medical monitoring and recordkeeping regulations that prevented necessary information from being transmitted to her personal physician on a timely basis. The neglect occurred despite plaintiff's persistent complaints to nursing staff, administration, and finally, to a nursing home ombudsman. In addition, the facility had been cited for patient neglect by the Department of Health Services shortly before the patient's admission. And after her death, the facility was given a class “A” citation, which is given when inadequate care creates a substantial probability that death or serious physical harm would result. [Delaney v. Baker, supra](#), 20 Cal.4th at 27.

Most of the cases interpreting the **Elder Abuse** Act arise from nursing care or other residential facilities, which is not surprising, since that was the focus of the Legislature in passing the Act. But other cases also point to the level of egregious behavior required to establish a violation of the Act. See, for example: *Mack v. Soung* (2000) 80 Cal.App.4th 966 [allegations that physician concealed patient's untreatable **bedsore**, opposed her medically necessary hospitalization, and then abandoned the patient were sufficient to state cause of action]; *Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1141 [in an action for the issuance of a protective order, acts which demonstrated prior **abuse** included the defendant shaking his fists at Bookout, threatening to provoke her until she suffered a stroke and died, attempting to tape-record anything she said without her consent, locking her out of the residence, interfering with her access to her personal property, whether by secreting it in a locked storage facility, screwing cabinets closed, or removing her property, and forcing her to remain in her bedroom with the use of bright lights and cameras].

In essence, the SAC alleges that the County employees took control over Plaintiffs' persons and property without authority, and made decisions which violated certain of Plaintiffs' alleged rights, but these alleged facts do not rise to the level of the heinous, egregious conduct causing or exposing Plaintiffs to serious injury which is required to adequately plead a claim for violation of the **Elder Abuse** Act. While the allegations do attempt to allege misconduct by County and its employees of a certain description, which Plaintiffs claim constitute **Elder Abuse** (see paragraph 83(a)), there is no claim of serious or egregious neglect such that either Plaintiff was injured, exposed to or threatened with serious bodily harm. There is no claim that a specific care plan was deviated from or otherwise ignored, which led to serious injury. It is clear from the detail of the SAC's allegations that no such facts can be alleged, and the Second Cause of Action should be sustained without leave to amend as to County, Stagg-Hourigan, Brewster, and Liedholm.

To the extent Plaintiffs seek to hold County and its employees liable for whatever **abuse** they allege may have occurred at the hands of the other defendants (see pars. 81, 82, and 83(b) of the SAC), those allegations fail to state a claim against the County or its employees. There is no respondeat superior liability in this context. A public employee is not liable for an injury caused by the act or omission of another person. *Govt. Code section 820.8*.

#### **7. The Complaint Fails to State a Cause of Action Pursuant to *Probate Code Sections 850, 855, and 859*.**

The Fifth Cause of Action cites to *Probate Code sections 850, 855, and 859*, but they are not appropriately asserted in this setting. These sections refer to “this part” or this Chapter, of the Code, meaning Division 2, Part 19 of the *Probate Code, sections 850 through 859*. Those sections authorize the use of a petition to the Probate Court by certain specifically described persons for an order conveying either real or personal property to an appropriate claimant; they do not authorize double damages in a civil action, nor do they particularly authorize even a civil action itself. Plaintiffs do not allege which of the statutorily defined categories they fall under in order to make such a claim, or how this civil suit is to be considered a petition to the Probate Court. See *Probate Code section 850*. While such a petition under these statutes may include claims that are normally raised in a civil action (*section 855*), the court “may not grant a petition under this chapter if the court determines that the matter should be determined by a civil action.” *Probate Code section 856.5*. These statutes specifically contemplate that the petition and other remedies allowed by them are separate and distinct remedies from a civil action such as this one. See *Probate Code section 856.5*. Plaintiffs have failed to allege these statutes are properly asserted herein, and even if they are, they've failed to allege the appropriate statutory requirements for such a claim. The Fifth Cause of Action should be sustained without leave to amend.

#### **8. The Complaint Fails To Plead Federal And State Constitutional Law Claims.**

To properly state a claim under a *42 U.S.C. §1983*, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated (in this case, plaintiff alleges the right was the right to due process) and (2) that the alleged violation was committed by a person acting under the color of state law. “A plaintiff seeking recovery under *section 1983* must plead more than constitutional ‘buzzwords’ to survive demurrer. [Citation omitted.] The plaintiff must allege specific and nonconclusory facts showing the defendant's acts deprived him of a right, privilege or immunity secured by

the federal Constitution or federal laws. [Citation omitted.]” *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 268.

Simply tacking on a paragraph saying that “due process” has been violated is not sufficiently detailed to apprise these Defendants as to what conduct Plaintiffs allege constitutes these violations. Plaintiffs have failed to allege the specific violation, by a specific Defendant, of a right that is secured by the Constitution of the United States. The Sixth Cause of Action is defective because §1983 provides no constitutional right to an unmarried couple's mutual care and companionship or the care and companionship of their pets. Essentially, plaintiffs are claiming that Greene was deprived of his due process rights when defendants took him and Scull from their residence, separated the men, and interfered with their personal relationship and the companionship of their cats. It is not alleged how this rises to the level of a Constitutional right being violated. For example, by way of comparison, non marital co-habitants who are not registered California domestic partners have no rights under the California Family code. *Marvin v Marvin* (1976) 18 Cal.3d 660, 679-681, and have no standing to sue for loss of consortium under federal law. *Elden v. Sheldon* (1988) 46 Cal.3d 267, 269. And while the emotional connection between pet and pet owner has been recognized by the courts, there is no legal claim by an owner to recover for the loss of companionship of a pet. *McMahon v. Craig* (2009) 176 Cal.app.4th 1506, 1518. Defendants' general demurrer as to the sixth cause of action should be sustained without leave to amend. (CCP §430.10(e))

The seventh cause of action for violation of the California Due Process Clause alleges generally against all defendants that plaintiffs' personal property was seized, and that they were denied notice and an opportunity to be heard concerning personal property ownership and the disposition of personal property. Plaintiffs also claim that “[P]laintiff's (presumably Greene's) dignity would not have been impugned by the forced removal from his residence, in front of his neighbors, all without being afforded any chance to present his version of events or propose alternative actions.” (SAC, par. 115) Plaintiffs again fail to state facts sufficient to establish what due process rights existed as to these matters, how they were violated, by which Defendants specifically, and whether or how this occurred under the color of state law. Accordingly, plaintiffs fail to state a cause of action in violation of [Article I, Section 7 of the California Constitution](#).

Plaintiffs' eighth cause of action for violation of the Fourteenth Amendment appears identical to the seventh, and fails for identical reasons. Under the eighth cause of action for violation of federal due process rights, plaintiff (again, presumably Greene) alleges that “defendants” removed him from his home without any procedural protections such as notice and an opportunity to be heard, which also caused deprivation of his property and companionship with Scull. This due process cause of action is redundant; plaintiffs' §1983 cause of action encompasses it. A cause of action based on violations of the federal constitution, including due process, must be brought under §1983, which creates that private right of action. Defendants' general demurrer as to the eighth cause of action should be sustained without leave to amend.

The eleventh cause of action for violation of the Unruh Civil Rights Act is based on [Civil Code sections 51 and 52](#), and the allegations again fall short of the legal requirements for such a claim. Remedies under [Civil Code section 52\(a\)](#) are only recoverable upon a showing that certain types of persons have been denied equal accommodations, advantages, facilities, privileges, or services in a business establishment, and even then, only if that had occurred pursuant to the provisions of [Civ. Code sections 51, 51.5, or 51.6](#). Clearly, [section 51.5](#) does not apply, as there are no allegations that a business establishment discriminated against, boycotted or blacklisted, or refused to buy from, contract with, sell to, or trade with any identified person entitled to be free from such conduct. [Section 51.6](#) does not apply, as there are no allegations of unequal prices being charged to either of the plaintiffs.

The SAC attempts to trigger the remedies of [section 51](#) by alleging that the County is a business establishment (par. 134), and that it failed to “recognize Greene's on-going relationship” with decedent, and refused to allow contact and communication between them based on Greene's sexual orientation. (Par. 136) First, this is not the type of accommodation, advantage, etc., which is addressed by the statutes and case law. There is no allegation of a specific accommodation denied plaintiff which has been afforded others. The allegations are of an interference with the relationship between Greene and decedent Scull, and they are specific to these plaintiffs.

Research has found no case recognizing the Office of the Public Guardian as a business establishment under [Civil Code section 51](#). To the contrary, neither the Department of Corrections nor a local Housing Authority have been held to fall within this definition. See the cases of *Taorimina v. Calif. Dep't of Corrections* (S.D.Cal.1996) 946 F.Supp. 829, 833, where the court held that a prison does not qualify as a business under Unruh Act; and *McColm v. San Francisco Housing Authority* (2009 WL 2901596, 13 (N.D.Cal.)) where it was held that the San Francisco Housing Authority and its staff did not qualify as a business because they were not engaged in a calling, occupation or trade for purposes of making a livelihood or gain; they administered governmental housing programs to qualified participants. The County in this context is not a business establishment subject to [Civil Code section 51](#).

To the extent the SAC alleges this claim against Aqua Caliente Villa (par. 135), and seeks to hold the County and its staff liable for that party's conduct (pars. 18, 19, and 133), this attempt also fails as the County and its employees are not liable for the conduct of others. [Government Code section 820.8](#). Defendants' demurrer should be sustained as to the Eleventh Cause of Action without leave to amend.

***V. THE SPECIAL DEMURRER - THE FOURTEENTH CAUSE OF ACTION FOR ACCOUNTING AND  
FIFTEENTH CAUSE OF ACTION FOR CONVERSION ARE THE SUBJECT OF ONGOING LITIGATION.***

Plaintiffs' causes of action for Accounting and Conversion are already the subject of a Probate Court administration in the probate matter entitled In re Estate of Harold Scull (SPR-80832; See Request to Take Judicial Notice filed herein and incorporated herein by reference). That matter pertains to personal property belonging to Scull, and/or passing to Greene through Scull's estate. The inclusion of these two causes of action could lead to inconsistent results within the court system, and they should not be prosecuted in this action. The demurrer to these causes of action should be sustained without leave to amend. [CCP §430.10](#) (c).

***VI. CONCLUSION***

For the reasons set forth above, the Court should sustain these defendants' demurrers to the Second Amended Complaint in its entirety.

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Respectfully submitted,

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